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No. 93-5131

In The

Supreme Court of the United States

October Term, 1993

PAUL PALALAUA TUILAEPA,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of California

PETITIONER'S REPLY BRIEF

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ARGUMENT

Petitioner submits the following points in response to the briefing by respondent and amicus CJLF:

1. In arguing that Eighth Amendment vagueness analysis is inapplicable to petitioner's penalty trial (Respondent's Consolidated Brief on the Merits, hereinafter "RCB," pp. 23-51), respondent does not address the specific instructions, arguments, or verdict forms given to petitioner's sentencing jury. Instead, respondent relies on the California Supreme Court's recent reinterpretation of the State's capital sentencing scheme in *People v. Bacigalupo*, 6 Cal.4th 457, 862 P.2d 808 (1993). Respondent says that the approach taken in *Bacigalupo* is "entirely consistent with the previous decisions of that court" (RCB at 38-39) and that the state court has never suggested the state scheme operates in the same manner as "another state wherein aggravating factors have been held to have constitutional significance" (RCB at 36).

Both statements are incorrect. First, in *People v. Visciotti*, 2 Cal.4th 1, 74, 825 P.2d 388 (1992), *cert. denied*, 113 S.Ct. 267 (1992), the court *explicitly* stated that the Eighth Amendment requirements of *Godfrey* "undoubtedly extend[] to aggravating factors identified in section 190.3." Second, prior to *Bacigalupo* the court consistently emphasized the focal role of section 190.3's enumerated factors in determining a capital sentence[1] and described

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[1] *See, e.g., People v. Kaurish*, 52 Cal.3d 648, 706, 802 P.2d 278 (1990), *cert. denied*, 112 S.Ct. 121 (1991); *People v. Hovey*, 44 Cal.3d 543, 583, 749 P.2d 776 (1988), *cert. denied*, 488 U.S. 871 (1988); *People v. Brown*, 40 Cal.3d 512, 544, 709 P.2d 440 (1985), *rev'd* on

the function of aggravating factors under the California scheme as "essentially equivalent" and "almost identical" to that of aggravating factors in Florida. *People v. Frierson*, 25 Cal.3d 142, 180, 599 P.2d 587 (1979); *People v. Brown*, 40 Cal.3d 512, 542-544, 709 P.2d 440 (1985).

Bacigalupo is a novel interpretation of section 190.3. It was not the law presented to petitioner's jury, which was given a list of enumerated circumstances, told that it must base its decision on these circumstances, and could not return a sentence of death without signing a verdict form finding the "aggravating circumstances substantially outweigh the mitigating circumstances." (JA 66.)

2. Petitioner's Brief (hereafter "PB"), at 13-14, cited an unbroken line of cases from *Maynard v. Cartwright*, 486 U.S. 356, 363-364 (1988), through *Espinosa v. Florida*, 505 U.S. ___, 120 L.Ed.2d 854, 112 S. Ct. 2926 (1992), and *Arave v. Creech*, 507 U.S. ___, 113 S.Ct. 1534 (1993), in which this Court applied the *Godfrey* analysis to aggravating factors whose only use was in the weighing process leading to death. Ignoring these cases, respondent and its amicus, the Criminal Justice Legal Foundation ("CJLF"), assert that the application of *Godfrey* to factors used to determine whether a defendant should live or die would significantly alter this Court's capital jurisprudence by requiring "yet another level of narrowing." (RCB at 43.)

This case does not remotely present the question whether the Eighth Amendment requires another level of

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other grounds *sub nom, California v. Brown*, 479 U.S. 538 (1987); *People v. Boyd*, 38 Cal.3d 762, 773, 700 P.2d 782 (1985).

narrowing. This Court has long held that a state procedure is subject to constitutional scrutiny even though the procedure itself is not constitutionally required. For example, although a state is not required to provide a full-scale preliminary hearing to determine probable cause to hold a defendant for trial, *Gerstein v. Pugh*, 420 U.S. 103 (1972), if it chooses to provide such a hearing it must furnish counsel for the defendant. *Coleman v. Alabama*, 399 U.S. 1 (1970). Similarly, although a state is not required to include the absence of an affirmative defense in defining the elements of a crime, *Patterson v. New York*, 432 U.S. 197 (1977), if it chooses to do so it must assume the constitutional burden of proof as to that element. *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

Likewise, when a state has affirmatively *chosen* to provide guidance to the sentencer in the form of enumerated factors to be weighed in aggravation and mitigation it may not allow the sentencer to rely on aggravating factors which are unconstitutionally vague. Justice Kennedy's opinion in *Stringer* explicitly recognized this critical point:

> Although our precedents do not require the use of aggravating factors, they have not permitted a State in which aggravating factors are decisive to use factors of vague or imprecise content.

Stringer v. Black, 503 U.S. ___, 112 S.Ct. 1130, 1139 (1992).

3. Respondent suggests that the Court's decisions in *California v. Brown*, 479 U.S. 538 (1983) and *Pulley v. Harris*, 465 U.S. 37 (1976) have resolved the issue presented here. (RCB at 47-48.) Nothing in either decision supports the proposition that California is free to require

the jury to weigh vague aggravating factors in determining whether a defendant should live or die.

Neither case addressed the vagueness of aggravating factors. Cases are not authority for propositions not considered. *See Webster v. Fall*, 266 U.S. 507, 511 (1925). In *California v. Brown*, the Court simply held that the Eighth Amendment did not preclude an instruction advising the jury not to be swayed by "mere sympathy." In *Pulley v. Harris*, the Court rejected an attack under *Furman* on an earlier version of the California statute based on its failure to provide intercase proportionality review.[2] The fact that the Court has found other aspects of the California scheme constitutional does not speak to the question whether a particular aggravating factor is unconstitutionally vague. *Compare Proffit v. Florida*, 428 U.S. 242 (1976) (upholding the Florida scheme against *Furman* attack) *and Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909 (1976) (same with respect to the Georgia scheme) *with Espinosa v. Florida*, 505 U.S. ___, 112 S.Ct. 2926 (1992)

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[2] Respondent's citation of *Harris* for the proposition that the current California death penalty law "limits the death sentence to a small subclass of capital-eligible cases" is misleading. (RCB at 39, quoting *Harris*, 465 U.S. at 53.) The statute at issue in *Harris* was the 1977 death penalty law. It listed seven special circumstances, one of which included five types of "willful, deliberate, and premeditated" felony-murder. *See Harris*, 465 U.S. at 51, fn. 13; former Cal. Penal Code § 190.2 (Cal. Stats. 1977, ch. 316, § 9). In contrast, the 1978 version of the law applied in Petitioner's case greatly expanded the number of special circumstances, listing nineteen special circumstances, one of which includes nine types of felony murder without the heightened mens rea required by the 1977 statute. Cal. Penal Code § 190.2.

(holding a particular aggravating factor under Florida law unconstitutionally vague) *and Godfrey v. Georgia*, 446 U.S. 420 (1980) (same with respect to an aggravating factor under Georgia law).

4. Respondent and CJLF both argue that the Court's decision in *California v. Ramos*, 463 U.S. 992 (1983), support the proposition that petitioner's jury could properly weigh vague aggravating factors in sentencing him to die because these factors were used in the weighing process which led to death rather than in the narrowing process that made him eligible for the death sentence. (RCB at 30, 47; CJLF Brief at 10.)[3] Nothing in *Ramos* supports that proposition, because *Ramos* involved a jury instruction which was used *neither* to narrow the death eligible class *nor* as an aggravating factor in the weighing process.

Ramos was sentenced to death under the same California scheme at issue here, and the jury was instructed to weigh the enumerated aggravating and mitigating factors to reach its sentencing decision. 463 U.S. at 995 and n.3. The defendant challenged the trial court's provision of the "Briggs Instruction," an instruction which informed the sentencing jury about the Governor's power to commute a sentence of life without the possibility of parole.[4] This Court viewed the

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[3] CJLF goes further, boldly suggesting that the actual "Question Presented" in this case is whether *Stringer* overruled *Ramos*. (CJLF Brief at i.)

[4] At the time, Penal Code section 190.3 required the trial court to instruct the jury:

> "that a sentence of confinement to state prison for a term of life without possibility of parole may in future

instruction as an invitation for the jury to consider a defendant's "future dangerousness" if released from prison. *California v. Ramos, supra,* 463 U.S. at 1003. Relying on *Jurek v. Texas,* 428 U.S. 262 (1976), the Court held that the Constitution did not prohibit the jury from considering the question of the defendant's future dangerousness or from receiving accurate information about one of its sentencing options.

The commutation instruction at issue in *Ramos* has *never* been a part of the list of aggravating and mitigating factors California juries have been told to weigh in determining whether a defendant should live or die. Justice O'Connor's opinion for the Court makes clear not only that the instruction was merely "informational," but that the jury was not advised or encouraged to reach its verdict in reliance upon this information. *California v. Ramos,* 463 U.S. at 1012, n.29.[5]. The Briggs instruction was given "[i]n addition" to the instructions on aggravating and mitigating factors. *Id.* at 995.

Respondent and CJLF's contention that *Ramos* supports the use of vague aggravating factors in the weighing process has been squarely rejected by this Court. In *Stringer,* as here, CJLF argued that where a state had

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after sentence is imposed, be commuted or modified to a sentence that includes the possibility of parole by the Governor of the State of California."

[5] In a decision issued subsequent to *Ramos,* the state supreme court made clear that under state law the only matters to be weighed in the penalty determination are the aggravating and mitigating circumstances listed in Penal Code section 190.3. *People v. Boyd,* 38 Cal.3d 762, 773, 700 P.2d 782, 790 (1985).

already narrowed the class of death eligible defendants, *Ramos* allowed it to use vague aggravating factors. (*Stringer v. Black,* Brief of Amicus CJLF at 12-13.) Mississippi adopted CJLF's position on *Ramos* in oral argument (*Stringer v. Black,* Transcript of oral argument at 14-16.) *Stringer* rejected that argument. 112 S.Ct. at 1139. Respondent and CJLF's interpretation of *Ramos* is no different and no better than it was two years ago.

Respectfully submitted,

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